TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~268.~~ 47

THE FIRST UNITARIAN SOCIETY OF CHICAGO, PLAINTIFF IN ERROR,

vs.

H. FLOYD FAULKNER AND GEORGE R. CLARKE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 16, 1873.

IN THE

SUPREME COURT

OF THE UNITED STATES,

Of the October Term. A. D. 1874.

THE FIRST UNITARIAN SOCIETY OF CHICAGO,
Plaintiff in Error,
—vs.—
H. FLOYD FAULKNER and GEORGE K. CLARKE,
Defendants in Error.

Writ of Error to Northern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

Daniel L. Sharey.

ATTORNEY FOR PLAINTIFF IN ERROR.

CHICAGO:
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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the fifteenth day of March, in the March term of said court, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-seventy year.

WILLIAM H. BRADLEY, *Clerk.*

H. FLOYD FAULKNER AND GEORGE R. CLARKE
vs.
THE FIRST UNITARIAN SOCIETY OF CHICAGO. } 10630. Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the eighteenth day of October, A. D. eighteen hundred and seventy-two, came H. Floyd Faulkner and George R. Clarke, plaintiffs, by J. A. L. Whittier, esq., their attorney, and filed in the office of the clerk of the circuit court of the United States
2 for said northern district of Illinois, at Chicago, in the district aforesaid, their præcipe for a writ of summons against the First Unitarian Society of Chicago, defendant. And also at the same time filed their bond for costs in said entitled cause, which said præcipe and bond are respectively in the words and figures following, to wit:

PRÆCIPE.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States, term, A. D. 1872.

H. FORD FAULKNER AND GEO. R. CLARKE, copartners, &c., under the firm-name of H. Floyd Faulkner & Geo. R. Clarke, of Boston, Mass., plaintiffs,
vs.
THE FIRST UNITARIAN SOCIETY OF CHICAGO, defendants. } Assumpsit. Damages, $6,000.

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of trespass, on the case upon promises, to the damage of said plaintiff in the sum of six thousand dollars, direct the same to the marshal of said district to execute, and
3 make it returnable to the November term of said court, A. D. 1872.

J. A. L. WHITTIER,
Plaintiff's Attorney.

To WM. H. BRADLEY, Esq., *Clerk.*

CHICAGO, 19 *October*, 1872.

(Endorsed:) Filed this 18th day of October, A. D. 1872. Wm. H. Bradley, clerk.

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, December term, A. D. 187 .

H. FLOYD FAULKNER & GEO. R. CLARKE, copar'ners, &c.,
vs.
THE FIRST UNITARIAN SOCIETY OF CHICAGO. } In assumpsit.

I enter myself security for costs in this cause, and promise to pay all

costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them, hereby agree and stipulate that execution may issue against my property for any costs taxed against them.

Dated this 18th day of October, A. D. 1872.

4 J. A. L. WHITTIER.

(Endorsed:) Filed Oct. 18th, A. D. 1872. Wm. H. Bradley, clerk.

On the same day, to wit, the eighteenth day of October, A. D. 1872, a writ of summons issued out of said clerk's office against said defendant, in said entitled cause, which said writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, *ss:*

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon the First Unitarian Society of Chicago, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the third Monday of December next, to an-

5 swer unto H. Floyd Faulkner and George R. Clark, copartners, &c., under the firm name of H. Floyd Faulkner & Geo. R. Clark, of a plea of trespass on the case upon promises to their damage, as they allege, of six thousand dollars; and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this eighteenth day of October, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the 97th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

I served the within summons upon the Frst Unitarian Society of Chicago, the defendant therein named, by delivering a true copy thereof to H. J. McFarland, one of the trustees of said society, on the 19th day of November, A. D. 1872, and by delivering a true copy thereof to James L. Ward, another of the trustees of said society on the 5th day of December, A. D. 1872.

B. H. CAMPBELL,
U. S. Marshal,
By S. H. TOURTELLOTTE, *Depy.*

6 (Endorsed:) Filed Dec. 27th, A. D. 1872. Wm H. Bradley, clerk.

On this day, to wit, the 6th day of December, A. D. 1872, said plaintiffs, by their attorney, filed in said clerk's office their declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois:

H. Floyd Faulkner and George R. Clarke, copartners under the name of H. Floyd Faulkner & Geo. R. Clarke, who are residents of the State of Massachusetts and citizens of the United States, plaintiffs in this suit, by J. A. L. Whittier, their attorney, complain of the First Unitarian Society of Chicago, a religious corporation organized under the laws of the State of Illinois, and resident in Chicago, in the district aforesaid, defendant, who was summoned, etc., in a plea of assumpsit.

For that, whereas, heretofore, to wit, on the first day of Octo-
7 ber, A. D. 1872, at said northern district of Illinois, the said defendant was indebted to the said plaintiffs in the sum of six thousand (6,000) dollars for the work and labor, care and diligence, of the said plaintiffs by the said plaintiffs, before that time done, performed, and be'towed in and about the business of the said defendant and for the said defendant, and at the special instance and request of said defendant. And also in the like sum for certain other labor, care, and diligence of the said plaintiffs as architects, by said plaintiffs before that time done, performed, and bestowed in and about the making and preparing of design, plan, drawings, specifications, and estimates for a certain church building, with basement, and for said defendant, and at the special instance and request of said defendant.

And also in the like sum for certain other labor, care, and diligence of the said plaintiffs as architects, by said plaintiffs before that time done, performed, and bestowed in and about the making and preparing of a certain other design and drawing, showing elevation of a church build-
ing, with a chapel, and tower between church and chapel, and
8 for said defendant, and at the special instance and request of said defendant. And also in the like sum for certain other labor, care, and diligence of said plaintiffs as architects, by them before that time done, performed, and bestowed in and about the making and preparing a modification of the design and drawings last mentioned, with a chapel, making the tower at an angle of the church, and for said defendant, and at the special interest and request of said defendant. And also in the like sum for certain other labor, care, and diligence of said plaintiffs as architects, by said plaintiffs before that time done, performed, and bestowed in and about the making and preparing a design and drawings, showing the elevations of a basement church building, without tower, and for the said defendants, and at the special instance and request of said defendant. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, undertook and promised
9 to pay the said plaintiffs the said sum of money above mentioned when the said defendant should be thereunto afterwards requested.

And whereas, also, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, in consideration that the said plaintiffs, at the like special instance and request of the said defendant, had, before that time, done, performed, and bestowed their certain other work, labor, care, and diligence in and about other the business of and for

the said defendant, the said defendant undertook, and then and there promised, to pay the said plaintiffs so much money, as they therefor reasonably deserved to have of the said defendant, when the said defendant should be thereunto afterwards requested. And the said plaintiffs aver that they reasonably therefor deserved to have of the said defendant the further sum of six thousand dollars, to wit, at the district aforesaid, whereof the said defendant afterwards, to wit, on the day and year last aforesaid, then had notice.

And whereas, also, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, in consideration that the said plaintiffs, at the like special instance and request of the said defendant,
10 had, before that time, done, performed, and bestowed their certain other work, labor, services, care, and diligence as architects in and about the making and preparing for the said defendant a design, plan, drawings, specifications, and estimates for a church building, with basement, and in and about the making and preparing for said defendant of certain other design and drawings, showing the elevation of a church building, with a chapel, and a tower between the church and chapel; and also in and about the making and preparing for said defendant a modification of the design and drawings last mentioned, with a chapel, making the tower at an angle of the church building; and also in and about the making and preparing for said defendant a design and drawing showing the elevation for a basement church, without tower, the said defendant undertook, and then and there promised, to pay the said plaintiffs so much money, as they therefor reasonably deserved to have of the said defendant, when the said defendant
11 should be thereunto afterwards requested.

And the said plaintiffs aver that they therefor reasonably deserved to have of the said defendant the further sum of six thousand dollars, to wit, at the district aforesaid, whereof the said defendant afterwards, to wit, on the day and year last aforesaid, then and there had not'ce.

Yet the said defendant, although often requested so to do, hath not paid the said several sums of money above mentioned, nor any or either of them, or any part thereof, to the said plaintiffs, but so to do hath hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of said plaintiffs of six thousand dollars; and therefore they bring this suit, etc.

J. A. L. WHITTIER,
Attorney for Plaintiffs.

F. C. INGALLS, *of Counsel.*

Copy of account sued on.

CHICAGO, *Oct. 1st*, 1872.

The First Unitarian Society of Chicago to H. Floyd Faulkner & Geo. R. Clarke, Dr.

12, 13	For services as architects in making design, plan, drawings, specifications, and estimates for church building, with basement, to cost $78,000.00	$2,730 00
	For second design and drawing, showing the elevation of church building, with chapel in rear, and tower between church and chapel, to cost $70,000.00	700 00

Modification of above design, with chapel in rear, and tower at angle of church, to cost $70,000.00	700 00
Design of basement church, without tower, to cost $40,000.00.	400 00
	$4,530 00

(Endorsed:) Filed Dec. 6th, 1872. Wm. H. Bradley, clk.

14 On this day, to wit, the 12th day of December, A. D. 1872, said defendant, by its attorneys, filed in said clerk's office its plea and affidavit in said entitled cause, which said plea and affidavit are in the words and figures following, to wit:

Plea & affidavit.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court of the U. S. for the northern district of Illinois.

THE FIRST UNITARIAN SOCIETY OF CHICAGO *ads.* H. FLOYD FAULKNER AND GEORGE R. CLARKE, copartners, &c. } Plea.

The First Unitarian Society of Chicago, defendant in this cause, by Shorey & Norton, its attorneys, comes and defends the wrong and injury when, &c., and says that it did not promise and undertake, in manner and form as the said plaintiffs have in their said declaration thereof complained against it, and of this it puts itself upon the country, &c.

By SHOREY & NORTON,
Deft's Attys.

STATE OF ILLINOIS,
Cook County, ss:

15 H. J. Macfarland, being first duly sworn, on oath says that he is one of the trustees of the First Unitarian Society of Chicago, defendant in this cause, and that, as he believes, said defendant has a good defence thereto upon the merits.

And further says not.

H. J. MACFARLAND.

Subscribed and sworn to before me this 12th day of December, A.D. 1872.

[SEAL.]

F. A. SMITH,
Notary Public.

(Endorsed:) Filed Dec. 12, 1872. Wm. H. Bradley, clk.

16 On this day, to wit, the 12th day of February, A. D. 1873, in the December term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

Dep't. ruled to produce records.

H. FLOYD FAULKNER ET AL.
vs.
THE FIRST UNITARIAN SOCIETY OF CHICAGO. } Assumpsit.

On motion of the plaintiff, by their attorney, upon affidavit filed, it is ordered by the court that the defendant produce upon the trial of this cause the records of said society since the first day of January, eighteen hundred and seventy-two.

On this day, to wit, the 5th day of March, in the March term, A. D. 1873, of said court in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

Jury empanneled.

H. FLOYD FAULKNER ET AL.
vs.
THE FIRST UNITARIAN SOCIETY OF CHICAGO. } Assumpsit.

17 Now come the parties by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit, Eugene Rodgen, Alexander White, William Johnson, Gabriel Ruger, William Sensor, William Van Fleet, L. J. Walsh, James Foster, John J. Kearney, Ichabod Hart, John H. Moore, and W. F. Moore, who were all duly elected, tried, and sworn, well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On the next day, to wit, the 6th day of March, in said March term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

H. FLOYD FAULKNER ET AL.
vs.
THE FIRST UNITARIAN SOCIETY OF CHICAGO. } Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empanneled and sworn, and after hearing
18 the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On the next day, to wit, the 7th day of March, in said March term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

Verdict, &c.

H. FLOYD FAULKNER ET AL.
vs.
THE FIRST UNITARIAN SOCIETY OF CHICAGO. } Assumpsit.

Now come again the parties, by their attorneys, and now come also

the jury in this behalf empanneled and sworn, and after hearing the concluding arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit: We, the jury, find the issue for the plaintiffs, and assess their damages
19 to the sum of thirty-eight hundred and sixty-two dollars and fifty cents.

And thereupon the defendant, by its attorney, moves the court for a new trial herein.

20 On this day, to wit, the 15th day of March, A. D. 1873, said plaintiffs, by their attorney, filed in said clerk's office their remittitur in said entitled cause, in words and figures following, to wit:

Remittitur.

In the circuit court of the United States for the northern district of Illinois.

H. FLOYD FAULKNER ET AL.
v.
THE FIRST UNITARIAN SOCIETY OF CHICAGO. } Law.

Now, after verdict rendered, and before judgment entered, come the plaintiffs by their attorney, and consent that the said verdict of three thousand eight hundred and sixty-two $\frac{50}{100}$ (3,862.50) dollars may be diminished to the sum of nine hundred sixty-two $\frac{50}{100}$ (962.50) dollars, in accordance with the directions of the judge presiding in the trial of said cause, and that judgment may be entered in the sum of two thousand nine hundred (2,900) dollars.

By J. A. L. WHITTIER,
Attorney for said Plaintiff.

Dated March 15th, 1873.

(Endorsed:) Filed Mar. 15, '73. Wm. H. Bradley, clk.

21 Afterwards, to wit, the 15th day of March, in the March term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

Judgment, &c.

H. FLOYD FAULKNER AND GEORGE R. CLARKE
vs.
THE FIRST UNITARIAN SOCIETY OF CHICAGO. } Assumpsit.

This day came the parties, by their attorneys, and thereupon comes on to be heard the motion of the defendant heretofore entered herein for a new trial of this cause, and after hearing the arguments of counsel, the court being sufficiently advised in the premises, and upon intimation of the court, the plaintiffs, by their attorney, entered remittitur upon the verdict herein in the sum of nine hundred and sixty-two dollars and fifty cents; and thereupon the court overrules said motion.

It is thereupon considered and adjudged by the court that the plaintiffs do have and recover of the defendant the sum of twenty-
22 nine hundred dollars, their damages, being the amount of the

damages assessed herein by the jury, less the remittitur aforesaid, together with their costs in this behalf expended, amounting to the sum of forty-two dollars and twenty-five cents, and that they have execution therefor.

23 On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record, and are in the words and figures following, to wit:

Bill of exceptions.

Circuit court of the United States, northern district of Illinois.

UNITED STATES OF AMERICA,
State of Illinois, ss:

H. FLOYD FAULKNER AND GEORGE R. CLARK
vs.
THE FIRST UNITARIAN SOCIETY OF CHICAGO.

Be it remembered that on the trial of the above-entitled cause, the plaintiffs, with other testimony, offered in evidence the testimony of George R. Clark, one of the plaintiffs, tending to prove that, a' the request of the defendant, the plaintiffs had submitted plans for a church edifice, in competition with other architects, for the examination and choice of the defendant.

24 And further, the testimony of the same witness tending to prove the purport of certain conversations held between the witness and Rev. Robert Laird Collyer, and of the action of plaintiffs in consequence thereof—which was objected to by defendant's counsel, because there was nothing in the evidence to show that Mr. Collyer was in any sense the agent of the defendant; and said objection having been overruled by the court, defendant's counsel duly excepted to such ruling of the court.

And the plaintiffs further offered in evidence testimony of the said George R. Clarke tending to show statements and admissions purporting to have been made by the said Rev. Robert Laird Collyer at a social parish meeting of the church of which the said Collyer is pastor, in relation to the employment of the plaintiffs as architects, by the defendant; which evidence was objected to by the counsel for the defendant for the reasons last above stated; which objections were overruled by the court, to which rulings of the court the defendant duly excepted; and there was no evidence given in said cause tending to show that said Collyer had any authority to act for the defendant in relation to the employment of the plaintiffs as architects or otherwise.

25 [The foregoing statement does not contain all the facts touching the exceptions taken. When the plaintiffs' counsel offered to prove the conversations between Mr. Clarke and Mr. Collier, the defendant's counsel objected, & thereupon the plaintiff's' counsel said they expected to show that Mr. Collier acted as the agent of the society, and that his acts were acquiesced in by the society; and then the court stated to defendant's counsel the testimony might come in upon the understanding that the court would give the proper directions to the jury on the subject; adding also that if the plaintiffs proved Mr. Collier was the agent of the society, the testimony would become material.

The exceptions were taken to the ruling of the court in thus admitting the declarations of Mr. Collier, both in his interview with Mr. Clark (who acted for the plaintiffs throughout in submitting and modifying their plans)

and at the social meeting. But at this meeting there were present most of the members of the building-committee & many members of the society, and considerable conversation took place about the plans for the church,
and Mr. Clark refused to show his plans except as the architect
26 of the church, and then Mr. Collier said Mr. Clark was right; that
they had treated him as the architect. The attention of the court was not again called to the question as to the admissions of what was said by Mr. Collier, by the counsel of the defendant, neither did the court refer to the subject. And for this reason: The only effect of the admissions or declarations made by Mr. Collier on the occasions mentioned was to show that Mr. Clark was the architect of the society. The court considered this fact was not proved by the plaintiffs, and the case was submitted to the jury on that hypothesis. The real question on this part of the case was, whether, when the plaintiffs' plans were conditionally accepted and modified, alterations made at the suggestion of the committee, and otherwise, and finally rejected, they were to be paid anything for their services. The court therefore regarded the admissions of Mr. Collier as not at all material, and supposed that the defendant's counsel so considered them, or he would have afterwards called the attention of the court to its ruling on these admissions.

But, independant of this, while it is true that Mr. Collier originally had no authority to employ the plaintiffs as architects, there was
27 evidence tending to show that he, as the pastor of the church, acted and consulted with the committee, with their consent. And it appeared that, at the instance of Mr. Collier, there was an alteration made as to the size of the church, and about which there was no controversy.]

And the defendant, to maintain the issue in its behalf, introduced evidence tending to show that on the 22nd day of January, A. D. 1872, the defendant, The First Unitarian Society of Chicago, at a legal meeting of said society, appointed a building-committee for the erection of a new church edifice, consisting of H. K. Elkins, Murry Nelson, Louis Wahl, N. Ludington, and D. L. Shorey, and at the same meeting instructed the building-committee to obtain plans for the church-building and submit them to the society.

And the defendant further offered testimony tending to show that the said building-committee, on or about the 9th day of February, 1872, held their first meeting as a committee under their said appointment, and at such meeting several plans of church edifices were submitted to them in competition, and among others the plans of the plaintiffs;
28 and at said meeting said committee adopted the following resolutions in relation to the plans of the plaintiffs:

Resolved, that the building-committee adopt the plan presented by George B. Clarke, subject to the following qualifications:

1st. That the same be modified according to the wishes and suggestions of the building-committee.

2nd. That the contract for building the same shall not exceed $58,000.

3rd. That the action of this committee be ratified by a legal meeting of The First Unitarian Society.

And that immediately thereafter said committee caused due notice of their action in relation to said plans to be given to the plaintiffs.

And the defendant further offered evidence tending to show that on the 10th day of April, A. D. 1872, said committee reported their action in relation to said resolutions to the defendant, The First Unitarian Society of Chicago, at a legal meeting of said society; and thereupon said soci-

ety adopted at said meeting the following vote in relation thereto: "That the building-committee be and are hereby instructed to build a
29 church according to the first plan of George R. Clarke, provided the same can be built all complete and satisfactory at a cost not to exceed $58,000, including such material as this society now have, and, if that cannot be done, to build according to the first plan of Mr. Palmer submitted to-night, provided that can be built at a cost not to exceed $50,000, including materials on hand, all complete, and these estimates are not to include architects' commissions."

And the defendant further offered evidence tending to show that immediately after passing said vote plaintiffs had due notice thereof, (and there was evidence tending to show that the plaintiffs did not have notice of all the conditions and provisions annexed to this vote.)

And the defendant further offered evidence tending to show that the plaintiffs could not procure bids or contracts for the building of said church edifice according to their said plan for less than about $80,000, and that in consequence of such cost said society refused to construct said church edifice according to said plans of plaintiffs, and did not construct said church edifice; (but there was other evidence as to the cost of the church and as to the contract. And Mr. Clark, the plaintiff, testified that the lowest bid for the church handed in to the chairman of the building-committee in June, 1872, was $78,000; but it appeared that between the date of the conditional acceptance of the plaintiffs' plans, & the handing in of the bid, the price of all sorts of building-materials & of labor had greatly increased.)

30 The court then charged the jury in substance as follows:

"This action is brought by the plaintiffs for services alleged to have been performed in furnishing plans to the defendant for a church."

"On the 22nd of January, 1872, the society met, and a building-committee was appointed to obtain plans for a church-building, and submit them to the society. The committee became the agents of the society and were bound to follow their instructions. I do not understand that by the terms of these instructions the committee had any right to adopt plans. They were to receive them and to report them to the society. The building-committee, however, seem rather to have gone beyond the instructions, and at a meeting, which took place after certain plans had been submitted to them, and among others those of the plaintiffs, a resolution was adopted accepting the plans of the plaintiffs for the construction of the church, subject to certain conditions.

"This is no further important, perhaps, than as showing in what way the business was, in point of fact, transacted, and that there was a responsibility assumed somewhat beyond the scope of instructions
31 given, and, perhaps, this was not unnatural. We know how it is in these cases, that the business is left more or less to the control and management of a few persons, and they therefore thought they might assume this responsibility."

"This gave rise to a misapprehension on the part of Mr. Clarke. He assumed, and so did Mr. Collier and others, that the committee had adopted his plans, (although in fact it was only upon certain conditions,) and that he thereby became the architect of the society for the construction of the church.

"This will explain the statement made by Mr. Collier at the meeting—the 'sociable' as they call it—where he said that they had treated Mr. Clarke as the architect of the church.

"He merely meant by that, that the committee had so treated him

under certain conditions. He was not so in fact, and the committee had strictly no right to appoint him. The committee made a report to the society on the 10th of April. You will recollect the action of the committee was communicated to Mr. Clarke by the letter of Mr. Shorey of the 12th of Feb., which has been introduced in evidence, and it is to be regretted that the same course was not taken as to the result of
32 the meeting. It might have prevented misapprehension and the conflict in the evidence which we now see. In the report made to the society, the committee stated that they had adopted the plans of Mr. Clarke subject to certain modifications. The first was that they be modified according to the wishes and suggestions of the building-committee. The second, that the contracts for building should not exceed fifty-eight thousand dollars. You will observe the language used here: 'The contracts for building the same' (not the cost) 'shall not exceed the sum of fifty-eight thousand dollars.' In that respect it was different from the letter which Mr. Shorey wrote to Mr. Clarke. There it was, 'That the building when completed shall not cost more than fifty-eight thousand dollars.' You will understand that if the contracts might have been made at that time for fifty-eight thousand dollars, yet when completed the building might have cost more. The society at this meeting, after, in the first instance, rejecting the plans of Mr. Clarke, instructed the building-committee that they might adopt them, provided the church could be built, 'all complete and satisfactory, at a cost not to exceed fifty-eight thousand dollars, including such materials as
33 the society then had;' and if that could not be done, then they were instructed to adopt other plans which were submitted to the meeting.

"Now, the first part of the controversy in this case turns simply upon this question: Under what circumstances were the plans submitted? Were they submitted upon the understanding on both sides that there was to be no compensation unless they were accepted?

"If so, then of course every architect did it at his own risk and cost. All we know upon this subject is stated by Mr. Clarke, from which it is perhaps fairly to be inferred that the plans originally presented were presented on the understanding by all the architects in competition that no compensation was to be received by them unless they were adopted by the committee or by the society. The difficulty about the case is, that the plans of Mr. Clarke were accepted in a qualified sense. If they had been rejected at the time, either by the committee or by the society, conceding for a moment that the committee had the right to reject them, which, strictly speaking, they had not—there could have been no controversy. But one of the troubles in the case is to
34 know precisely upon what footing the parties stood in relation to the plans which were presented by Mr. Clarke. Mr. Clarke supposed he was the architect for the church, which is perhaps not strange, as the committee seem to have supposed they had the right on certain conditions to make him such. So that this is the turning point of this part of the case, conceding that the plans were presented by the various architects at their own risk and cost. In case they were not accepted, did this condition cease to operate in consequence of the action of the committee and of the society? In other words, after having with certain limitations and qualifications accepted the plans of the architect, is it fairly inferable, from all that took place afterwards, that it was the understanding Mr. Clarke was to go on, at his own expense, and risk his own labor, and that of those who were in his employment, if in point of fact plans should finally be rejected by the society?

"Now, in connection with this part of the case, it is important to consider the subject of cost. What is a fair inference, from the evidence which we have before us as to the cost? The cost of the church when completed should not 'exceed fifty-eight thousand dollars.'

35 "There must be a reasonable construction given to this language. It is manifest, as I have already said, contracts might have been let to parties apparently responsible at the time for that price, and yet the actual cost might have turned out to be greater. It is manifest also that there are certain elements always entering into matters of this kind, and that all reasonable men must construe this language with reference to these circumstances, so that construing it reasonably under the circumstances, it cannot, I think, fairly be supposed the meaning was that the church should not cost, to a dollar, beyond this amount; but here was a reasonable limit, applying all those ordinary rules which men of sense would apply to such a transaction as this. Now, I can illustrate this by referring to what was said by Mr. Shorey to Mr. Clarke at the interview which took place between them after the meeting of the society. He undertook to construe the resolution—he had given a very liberal construction to the original instructions from the society, much more so than he was willing to give to instructions in this instance to the building-committee. He told Mr. Clarke

36 that he meant that it should not cost five dollars more than fifty-eight thousand dollars.

"But I understand it to mean that it was a limit to the architects, and to the committee; not absolutely, but as nearly exact and absolute as the nature of the circumstances and of the case admitted. Now, this is no farther material than as it may bear on this general question whether Mr. Clarke all this time was going on, performing the services at his own expense upon the understanding that if his plans were ultimately rejected by the society, he was to have no compensation. It scarcely could be contended by Mr. Shorey, or by any member of the committee, that if the plans were accepted, and the contracts let at the price named, and Mr. Clarke had gone on and performed the service, and it had turned out that they would have had to expend more than fifty-eight thousand dollars to complete the church, that, therefore, Mr. Clarke was to have nothing for his services. Suppose the contractors all failed—became bankrupt; was Mr. Clarke to have nothing for what he had done, although the church did in consequence cost more than fifty-eight thousand dollars?"

37 (And the court instructed the jury that if what Mr. Clarke did, after the qualified acceptance of his plans, was upon the same condition in which the various competing plans, were originally put in, then the plaintiffs could not recover, and they could only recover upon the hypothesis that it was understood between the parties that, in case the plans of the plaintiffs were ultimately rejected, as in fact they were, they were to have a reasonable compensation for services performed. The court also instructed the jury that the defendant was only liable for the acts of its agents duly authorized or ratified by the society. And the court also instructed the jury what was the rule of damages if they should find for the plaintiffs.)

To the following part of the above charge, the defendant then and there excepted, viz:

"Now in connection with this part of the case, it is important to consider the subject of cost. What is a fair inference from the evidence which we have before us as to the cost? The cost of the church when completed should not exceed fifty-eight thousand dollars. There must

38 be a reasonable construction given to this language. It is manifest, as I have already said, contracts might have been let to parties apparently responsible at the time for that price, and yet the actual cost might have turned out to be greater.

"It is manifest that there are certain elements always entering into matters of this kind, and that all reasonable men must construe this language with reference to these circumstances, so that construing it reasonably under the circumstances, it cannot, I think, fairly be supposed the meaning was that the church should not cost to a dollar beyond this amount; but here was a reasonable limit to the cost, applying all those ordinary rules which men of sense would apply to such a transaction as this.

"Now, I can illustrate this by referring to what was said by Mr. Shorey to Mr. Clarke at the interview which took place after this meeting of the society. He undertook to construe the resolution. He had given a very liberal construction to the instructions from the society, much more so than he was willing to give to the instructions in this instance to the building-committee. He told Mr. Clarke that he meant
39 that it should not cost five dollars more than fifty-eight thousand. But I understand it to mean that it was a limit to the architect, and to the committee, not absolutely, but as nearly exact and absolute as the nature of the circumstances and of the case admitted."

And thereupon the said jury gave their verdict against the defendant. Whereupon the counsel for the defendant filed the following motion for new trial.

Motion for new trial.

UNITED STATES OF AMERICA,
State of Illinois:

Circuit court of the United States, northern district of Illinois.

H. FLOYD FAULKNER AND GEORGE R. CLARKE
vs.
THE FIRST UNITARIAN SOCIETY OF CHICAGO.

And now comes the defendant, by Shorey & Norton, its attorneys, and moves the court to set aside the verdict of the jury in said cause, and for a new trial, because—

1st. The court erred in admitting improper evidence to go to
40 the jury, and especially the evidence as to statement made by Rev. R. L. Collier.

2nd. The court erred in charging the jury that the committee of defendant had exceeded their instructions, and that the plaintiff might thereby have misapprehended the state of affairs. Also, in charging the jury, Rev. R. L. Collier supposed that the plaintiff was the architect of the society. In charging the jury that the limitation of $58,000 in the vote of the society was not a condition binding upon the committee and upon Mr. Clarke.

3d. The verdict of the jury is contrary to the law and the evidence of the case.

4th. The jury, in assessing the damages, disregarded the charge of the court.

5th. The damages assessed by the jury are excessive.

And for sundry other reasons.

SHOREY & NORTON,
Attys. for Defendant.

(Endorsed:) Filed March 15, '73. Wm. H. Bradley, clk.

But the court overruled the said motion, and upon the plaintiffs, at the instance of the court, remitting $962.50 from said verdict,
41 the court gave judgment against the defendant for the sum of $2,900, to which the defendant then and there excepted. And inasmuch as the matters aforesaid do not appear of record, the counsel for the defendant presents this bill of exceptions, and prays that the same may be signed and sealed by the court, and made a part of the record in said cause. And is done accordingly.

THOMAS DRUMMOND.

(Endorsed:) Filed.

42 On this day, to wit, the 24th day of March, A. D. 1873, said defendant, by its attorneys, filed in said clerk's office its bond in said entitled cause. Which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

H. FLOYD FAULKNER AND GEORGE R. CLARKE
vs.
THE FIRST UNITARIAN SOCIETY OF CHICAGO.

Know all men by presents that we, The First Unitarian Society of Chicago and Alpheus C. Badger and Murry Nelson, are held and firmly bound unto H. Floyd Faulkner and George R. Clarke in the sum of four thousand five hundred dollars, ($4,500.00,) to be paid to the said H. Floyd Faulkner and George R. Clarke, their executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, each of our, heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this seventeenth day of March, A. D. 1873.

43 Whereas the above-named, The First Unitarian Society of Chicago, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the circuit court of the United States for the northern district of Illinois in the above entitled suit.

Now, therefore, the condition of this obligation is such that if the above-named The First Unitarian Society of Chicago shall prosecute his said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE FIRST UNITARIAN SOCIETY OF CHICAGO, [SEAL.]
By HENRY J. MACFARLAND. [SEAL.]
JOHN T. McAULEY, [SEAL.]
JAMES L. WARD, [SEAL.]
Trustees of The First Unitarian Society of Chicago.

Sealed and delivered in presence of—

ALPHEUS C. BADGER. [SEAL.]
MURRY NELSON. [SEAL.]

Approved—

THOMAS DRUMMOND.

(Endorsed:) Filed March 24th, 1873. Wm. H. Bradley, clk.

44 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause of H. Floyd Faulkner et al. against

The First Unitarian Society of Chicago, as appears from the records of said court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office in the city of Chicago, in the district aforesaid, this sixteenth day of September, A. D. 1873, and of our Independence the ninety-eighth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

45 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between H. Floyd Faulkner and George R. Clarke, plaintiffs, and The First Unitarian Society of Chicago, defendant, a manifest error hath happened, to the great damage of the said The First Unitarian Society of Chicago, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, this twenty-fourth day of March, A. D. eighteen hundred and seventy-three, and of our Independence the ninety-seventh year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

46 UNITED STATES OF AMERICA, *ss:*

To H. Floyd Faulkner and George R. Clarke, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein The First Unitarian Society of Chicago is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness my hand this 11th day April, in the year of our Lord one thousand eight hundred and seventy-three.

THOMAS DRUMMOND, *Cirt. Judge.*

47 Service of the within citation admitted this 1st day of May, A. D. 1873.

J. A. L. WHITTIER,
Plff's Atty.

(Indorsed:) Supreme Court of U. S. The First Unitarian Society of Chicago v. H. Floyd Faulkner and George R. Clarke. Citation.

(Indorsement on cover:) No. 268. The First Unitarian Society of Chicago, plaintiff in error, vs. H. Floyd Faulkner and George R. Clarke. N. Illinois, C. C. U. S. Filed 16th October, 1873.

IN THE

SUPREME COURT

OF THE UNITED STATES,

Of the October Term, A. D. 1874.

THE FIRST UNITARIAN SOCIETY OF CHICAGO,
Plaintiff in Error,
—vs.—
H. FLOYD FAULKNER and GEORGE R. CLARKE,
Defendants in Error.

Writ of Error to Northern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

Daniel L. Shorey,

ATTORNEY FOR PLAINTIFF IN ERROR.

CHICAGO:

Beach, Barnard & Co., Legal Printers, 98 Randolph Street.

1875.

Supreme Court of United States,

OF THE OCTOBER TERM, A. D. 1874.

THE FIRST UNITARIAN SOCIETY OF CHICAGO, *Plaintiff in Error,* —*vs.*— *H. FLOYD FAULKNER and GEORGE R. CLARKE,* *Defendants in Error.*	*Writ of Error to Northern District of Illinois.*

ARGUMENT FOR PLAINTIFF IN ERROR.

MAY IT PLEASE YOUR HONORS:

This is a writ of error from a judgment of the Circuit Court of the Northern District of Illinois.

STATEMENT OF FACTS.

The defendant in error, Clarke, testifies that he submitted to the plaintiff in error, plans for a church edifice, in competition with other architects. (Rec. p. 23). He further testified as to certain conversations between him and the Rev. Robert Laird Collier, and of the action of the defendants in error therein. This evidence was objected to because there was nothing in the evidence to show that Mr. Collier was the agent of the plaintiff in error. The same witness testified as to certain statements made at a social parish meeting of the church, of which Mr. Collier was pastor, in relation to the employment of the defendants

in error, as architect by the plaintiff in error. This evidence was objected to by counsel for plaintiff in error, for the same reason as above. There was no evidence given in the cause tending to show that Mr. Collier had any authority to act for the plaintiff in error. (Rec., p. 24.)

But counsel for the defendants in error states that they expected to show that Mr. Collier acted as the agent of the society, and the court allowed the testimony to come in with the understanding that he would give proper direction to the jury on the subject ; but that the attention of the court was not again called to the matter by counsel for plaintiff in error. The court stated that the only effect of the admissions or declarations made by Mr. Collier, was to show that Mr. Clarke was the architect of the society ; and the court considered this fact was not proved, and so instructed the jury. (Rec., p. 26).

At the first meeting of the committee, a large number of plans were submitted to the committee, in competition, with the usual understanding by all the architects in competition that no compensation was to be received by them, unless the plans were adopted. (Rec., p. 23, also 33).

Among the many plans offered to the committee, in competition, at its first meeting, were those of the defendants in error, who were represented by George R. Clarke, in relation to which the committee adopted the following resolution :

" *Resolved*, that the building committee adopt the plans " presented by Geo. R. Clarke, subject to the following " qualifications :

" 1st. That the same be modified according to the " wishes and suggestions of the building committee.

" 2nd. That the contract for building the same, shall " not exceed $58,000.

" 3rd. That the action of this committee be ratified by " a legal meeting of the First Unitarian Society." (Rec., p. 27).

Immediately afterwards, the committee gave due notice of their action to the defendants in error, and on the 10th day of April, 1872, reported these resolutions to the society at a legal meeting held on that day. And thereupon the society adopted the following resolution in relation thereto :

" That the building committee be, and hereby are in-
" structed to build a church according to the first plan of
" George R. Clarke, provided that the same can be built
" all complete and satisfactory, at a cost not to exceed
" $58,000, including such materials as this society now has,
" and if that cannot be done, to build according to the first
" plan of Mr. Palmer, submitted to-night, provided that
" can be built at a cost not to exceed $50,000, including
" materials on hand all complete—and these estimates are
" not to include architects' commissions." (Rec., p. 28.)

The plaintiff in error offered evidence to show that the defendants in error could not procure bids or contracts for the building of the church edifice, for less than $80,000. Mr. Geo. R. Clarke, one of the defendants in error, who alone represented the firm in Chicago, testified that the lowest bids procured by him, and furnished the building committee, amounted to $78,000, (Rec., p. 28), being $20,000 more than the limit fixed by the committee, and by the society.

The court charged the jury as follows :

" Now in connection with this part of the case, it is im-
" portant to consider the subject of cost. What is a fair
" inference from the evidence which we have before us, as
" to the cost ? The cost of the church when complete,
" should not exceed fifty-eight thousand dollars. There
" must be a reasonable construction given to this language.
" It is manifest, as I have already said, contracts might
" have been let to parties apparently responsible at the
" time, for that price, and yet the actual cost might have
" turned out to be greater. It is manifest that there are
" certain elements always entering into matters of this kind,

" and that all reasonable men must construe this language " with reference to these circumstances. So that construing it reasonably under the circumstances, it cannot, I " think, fairly be supposed the meaning was, that the church " should not cost to a dollar beyond this amount ; but here " was a reasonable limit to the cost, applying all those " ordinary rules which men of sense would apply to such " a transaction as this. * * * * * * " I understand it to mean that it was a limit to the architect " and to the committee, not absolutely, but as nearly exact " and absolute as the nature of the circumstances, and of " the case admitted.

ASSIGNMENT OF ERRORS.

I.

The court erred in admitting evidence to the jury of statements, purporting to have been made by the Rev. R. L. Collier, at a church sociable.

II.

The court erred in charging the jury in these words. " Now in connection with this part of the case, it is important to consider the subject of cost. What is a fair " inference from the evidence which we have before us, as " to the cost ? The cost of the church when completed, " should not exceed fifty-eight thousand dollars. There must " be a reasonable construction given to this language. It " is manifest, as I have already said, contracts might " have been let to parties apparently responsible at the " time, for that price, and yet the actual cost might have " turned out to be greater."

" It is manifest that there are certain elements always " entering into matters of this kind, and that all reasonable " men must construe this language with reference to these

" circumstances. I cannot, I think, fairly be supposed the " meaning was that the church should not cost to a dollar " beyond this amount ; but here was a reasonable limit to " the cost, applying all those ordinary rules which men of " sense would apply to such a transaction as this."

* * * * * * * *

" But I understand it to mean that it was a limit to the " architect, and to the committee, not absolutely, but as " nearly exact and absolute as the nature of the circum- " stances and of the case admitted."

ARGUMENT.

I.

The evidence of admissions made by the Rev. R. L. Collier at a social meeting, was clearly incompetent. He was not a member of the committee. He was not in any sense a legal agent of the society. The meeting at which he is said to have admitted that the defendants in error had been treated as architects of the society, was not a meeting of the society. The explanation made by the court on the 26th page of the record, is that the only effect of the admissions or declarations made by Mr. Collier was to show that Mr. Clarke was the architect of the society, and the court considered that fact not proven by the defendants in error, and that the case was submitted to the jury on that hypothesis. Of course the court understood the matter in the way here explained. But it seems to me that the jury may have fairly understood the ruling and charge of the court differently. Here was improper evidence admitted on a very material point of the case against objection of the counsel of the plaintiff in error ; and I do not think it appears from the record, that the objection was afterwards waived, or that the error was substantially corrected in the charge of the court.

II.

From the foregoing statement of facts, it appears that the plaintiff in error authorized a committee to procure plans for a church edifice, and to submit them to the society ; that at the first meeting of the committee, several architects, among others, the defendants in error, submitted their plans to the committee in competition, with the understanding that no plans were to be paid for, unless adopted by the society ; that the committee adopted the plans of the defendants in error, subject to the condition that the contract for building according to them, should not exceed $58,000, and to the further condition that the action of the committee should be ratified at a legal meeting of the society. On reporting their action, the society instructed the committee to build the church according to the plans of the defendants in error, provided the church could be built all complete for $58,000, and if that could not be done, then to build according to the plan of Mr. Palmer, at a cost not to exceed $50,000. It appears from the testimony of the defendant in error, Clarke, that the lowest bids he submitted to the committee for the construction of the church, amounted to $78,000. When this fact was reported to the society, it refused to build, and did not build according to the plans of the defendants in error. Upon these indisputable facts, it would seem that nothing can be clearer than that there was no contract on the part of the plaintiff in error to pay the defendants in error for these plans.

It is stated in the charge of the court, that if the plans of the defendants in error had been rejected by the committee, or by the society, there could have been no controversy, because it was the understanding of all the architects offering their plans in competion, that nothing was to be paid them unless their plans were adopted.

Well, the plans of the defendants in error were not adopted, either by the committee or by the society. The

committee, at the most, agreed to recommend the plans upon a certain condition, and that condition was not complied with, and they expressly state that their action was subject to the qualification, that it should be ratified by the First Unitarian Society, at a legal meeting. When the matter was referred to the society, its action was clear, prompt and decisive. It says to the committee, you may build on these plans of Faulkner & Clarke, at a cost of $58,000, and if you cannot build at such cost, then build on the plans of Palmer, at a cost of not more than $50,000. Greater precison and certainty in language than this, are not attainable. And when the defendants in error, as appears by the evidence of one of them, Mr. Clarke, submitted bids for building the church, the lowest of which amounted to $78,000, the society promptly refused to build upon these plans.

It is conceded, as I understand it, that if the society, on the coming in of the report of the committee, had refused to adopt these plans, then there would have been no liability to the defendants in error, for there would have been no contract.

Under the instructions of the court, the jury were authorized to make a distinction that seems to have no foundation in law. They are told in effect, that upon an unqualified refusal to adopt the plans, of the defendants in error, there would have been no liability ; but that the direction to the committee to adopt the plans provided the church could be built according to them for $58,000, rendered the society liable to pay for the plans, although it appeared on the evidence of the defendants in errror, that the church would cost $78,000, and the plans were thereupon rejected.

It seems to me clear that the jury were misled into giving the verdict, by the erroneous rulings of the court. We have seen that the society with remarkable clearness and certainty, fixed the limit of cost at $58,000, as the

condition upon which it would allow the plans to be used. But the plain and unambiguous meaning of the language used, both by the committee and the society, was disregarded by the court, in the charge to the jury. "What" says the court, "is a fair inference from the evidence which "we have before us, as to the cost? The cost of the church "when completed, should not exceed $58,000. There "must be a reasonable construction given to this language. "It is manifest, as I have already said, contracts might "have been let to parties apparently responsible at the "time, for that price, and yet the actual cost might have "turned out to be greater.

"It is manifest that there are certain elements always "entering into matters of this kind, and that all reasonable "men must construe this language with reference to these "circumstances, so that construing it reasonably under the "circumstances, it cannot, I think, fairly be supposed the "meaning was that the church should not cost to a dollar "beyond this amount; but here was a reasonable limit to "the cost, applying all those ordinary rules which men of "sense would apply to such a transaction as this."

The plaintiff in error in writing, instructs its committee to adopt the plans of the defendants in error, provided the church can be built according to them, for $58,000. The defendants in error then declare to the society, the fact that the church cannot be built for less than $78,000. The condition is not complied with, there is no meeting of the minds of the parties. There is nothing to submit to the jury, for the terms, conditions and limitations as expressed in the vote of the society, must speak exclusively for themselves. (2 Parsons on Con., 549.)

Rules of construction are resorted to, to ascertain the meaning of a contract, only in case of uncertainty, because when the meaning is plain and unquestionable, another meaning is not that which the parties have agreed to express. The court charges the jury, that the limit of $58,-

000 is to have a reasonable construction, that it was a limit to the architect, and to the committee, not absolutely, but as nearly exact as the nature of the case admitted. Now it is evidence that the jury must have understood this charge as a license, to find that the defendants in error had made a reasonable compliance with the condition imposed, notwithstanding they exceeded by $20,000 the limit of cost as fixed and rigidly adhered to by the society. This precise question arose in the case of the *Ada Street Methodist Church* v. *Garnsey*, 64 Ill., (not yet published), also reported in the 5th Legal News, p. 328. The court says: "The liability of the defendants depends upon the "fact of a contract to accept at all events, when the proof "is conclusive that the acceptance was conditional, de- "pending upon the fact that the building on appellee's "plans, could be built for a certain sum. Other architects "had submitted plans, but those of appellee were approved, "provided they could be carried out for a certain specified "sum of money. When the fact was ascertained that "could not be, all the plans submitted were rejected by the "building committee."

This is undoubtedly the true rule of law governing the facts in the case now before the court. If the court below had declared this rule, the jury would have given the defendants in error no verdict. Almost every sentence in the charge objected to, contains an error. It was an error to charge the jury that the words of limitation in the vote of the society, to the effect that the cost of the church when completed, should not exceed $58,000, must have a reasonable construction; since they are plain and free from ambiguity, and require no construction. It was an error to say to the jury that it is manifest that contracts might have been let for $58,000; since the issue was what the church would cost, and not what contracts could be let for. But if the true issue was what contracts could be let for, the defendant in error, Clark, testified that the lowest bids he

procured, amounted to $78,000, and the only other testimony was to the effect that the church would cost $80,000. The whole import of the charge is to the effect that the plaintiff in error had not a right to stand on the express limitation it had made; and had not a right to declare its condition not complied with on information by the defendants in error themselves, that the cost of the church would exceed by $20,000 the limit imposed.

And there is no merit in the claim of the defendants in error. The claim of all the other architects who offered their plans in competition, are equally valid. That of Palmer especially, was acted upon under the same vote, and in terms of like import, as those that relate to the plans of Faulkner & Clarke, and it would have cost more for plans voluntarily offered, and not adopted, than the proposed cost of the church edifice.

DANIEL L. SHOREY,

Attorney for Plaintiff in Error.

Supreme Court of the United States.

No. 57.

OCTOBER TERM, 1875.

THE FIRST UNITARIAN SOCIETY OF CHICAGO,

PLAINTIFF IN ERROR,

v.

H. FLOYD FAULKNER AND GEORGE R. CLARKE,

DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

R. M. CORWINE,
QUINTON CORWINE,
J. A. L. WHITTIER,
Counsel for Defendants in Error.

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
1875.

Supreme Court of the United States,

OCTOBER TERM, 1875.

THE FIRST UNITARIAN SOCIETY OF CHICAGO,
Plaintiff in Error,

vs.

H. FLOYD FAULKNER AND GEORGE R. CLARKE,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

STATEMENT OF FACTS.

This is a writ of error brought to reverse a judgment of DRUMMOND, J., sitting with a jury in the Circuit Court of the United States for the Northern District of Illinois.

The defendants in error were copartners in business as architects, in the city of Chicago, and brought suit against the First Unitarian Society, a religious corporation of that city, to recover for services rendered in and about the business of the said society, in drawing plans and furnishing specifications, etc., for a church edifice.

The declaration, with its bill of particulars, alleges the drawing of plans and the furnishing of specifications and estimates for a church building estimated to cost $78,000, and also the drawing of

three other sets of plans for the same purpose; and the actual claim was for the sum of $4,530. The *ad damnum* was $6,000.

Record, pp. 3–5.

The defendants below pleaded the general issue.

Record, p. 5.

Trial was had on the fifth, sixth and seventh days of March, 1873, and the jury found for the plaintiffs in the sum of $3,862.50, and the defendants moved for a new trial.

Record, pp. 6, 7.

At the direction of DRUMMOND, J., who presided at the trial, the plaintiffs entered a *remittitur* in the sum of $962.50, and the Court thereupon overruled the motion for a new trial, and ordered judgment to be entered for the plaintiffs in the sum of $2,900 and the costs amounting to $42.25.

Record, pp. 7, 8.

It appeared in evidence that the building committee of the society, after considering plans offered in competition, among which was the first plan of Mr. Clarke, adopted the following vote: —

Record, p. 9.

"*Resolved*, that the building committee adopt the plan presented by George R. Clarke, subject to the following qualifications: —

1st. That the same be modified according to the wishes and suggestions of the building committee.

2d. That the contracts for building the same shall not exceed $58,000.

3d. That the action of this committee be ratified by a legal meeting of the First Unitarian Society."

And that immediately after, said committee caused due notice of their action in relation to said plans to be given to the plaintiffs.

At a legal meeting of the said society the following vote was passed: —

Record, p. 10.

"That the building committee be, and are hereby instructed, to build a church according to the first plan of George R. Clarke, provided the same can be built, all complete and satisfactory, at a cost not to exceed $58,000, including such material as this society now have; and, if that cannot be done, to build according to the first plan of Mr. Palmer, submitted to-night, provided that can be built at a cost not to exceed $50,000, including materials on hand, all complete, and these estimates are not to include architects' commissions."

Record pp. 9, 10.

The record continues: —

"And the defendant further offered evidence tending to show that immediately after passing said vote plaintiffs had due notice thereof, *and there was evidence tending to show that the plaintiffs did not have notice of all the conditions and provisions annexed to this vote.*

"And the defendant further offered evidence tending to show that the plaintiffs could not procure bids or contracts for the building of said church edifice according to their said plan for less than about $80,000, and that in consequence of such cost said society refused to construct said church edifice according to said plans of plaintiffs, and did not construct said church edifice; but there was other evidence as to the cost of the church and as to the contract. And Mr. Clarke, the plaintiff, testified that the lowest bid for the church handed in to the chairman of the building committee *in June*, 1872, was $78,000; but it appeared that between the date of the conditional acceptance of the plaintiffs' plans, and the handing in of the bid, *the price of all sorts of building material and labor had greatly increased.*"

Argument.

This action was brought to recover for services rendered as architects to the defendants below, and it was defended on the ground that these services were only to be paid for on condition that the plaintiffs should furnish plans for a church edifice which should be erected at a cost not to exceed $58,000.

It was alleged in the declaration, and not controverted, that in fact *four sets of plans* were drawn at the request of this building committee, and the charges for services were composed of four items. But it is set up in reply, that because the *first* plan was not found to cost $58,000, no liability existed as to paying for any of them.

The case involved no questions of law, except as to two points, which are assigned here as error.

I. "The Court erred in admitting evidence to the jury of statements purporting to have been made by the Rev. R. L. Collier, at a church sociable."

This point and the position of the Court below as to it is fully set out in the bill of exceptions, as follows: —

Record, pp. 8–9.

"And further, the testimony of the same witness (Clarke, one of the plaintiffs), tending to prove the purport of certain conversations held between the witness and Rev. Robert Laird Collier, and of the action of plaintiffs in consequence thereof, which was objected to by defendants' counsel because there was nothing in the evidence to show that Mr. Collier was in any sense the agent of the defendants; and said objection having been overruled by the Court, defendants counsel duly excepted to such ruling of the Court.

And the plaintiffs further offered in evidence testimony of the said George R. Clarke, tending to show statements and admissions purporting to have been made by the said Rev. Robert Laird Collier at a social parish meeting of the church of which said Collier is pastor, in relation to the employment of the plaintiffs as architects by the defendants, which evidence was objected to by the counsel for the defendants for the reasons last above stated; which objections were overruled by the Court, to which rulings of the Court the defendants duly excepted; and there was no evidence given in said cause tending to show that said Collier had any authority to act for the defendant in relation to the employment of the plaintiffs as architects or otherwise."

To this statement, as incorporated into the bill of exceptions, the learned [redacted] tried the cause added, before signing the same,

the following explanation, which is relied upon by the defendants in error as conclusive as to the matter: —

"The foregoing statement does not contain all the facts as to the exceptions taken. When the plaintiffs' counsel offered to prove the conversations between Mr. Clarke and Mr. Collier, the defendants' counsel objected, and thereupon the plaintiffs' counsel said they expected to show that Mr. Collier acted as the agent of the society, and that his acts were acquiesced in by the society; and then the Court stated to defendants' counsel the testimony might come in upon the understanding that the Court would give the proper directions to the jury upon the subject; adding, also, that if the plaintiffs proved Mr. Collier was the agent of the society the testimony would become material.

"The exceptions were taken to the ruling of the Court *in thus admitting* the declarations of Mr. Collier, both in his interview with Mr. Clarke (who acted for the plaintiffs throughout, in submitting and modifying their plans), and at the social meeting. But at this meeting there were present most of the members of the building committee and many members of the society, and considerable conversation took place about the plans for the church, and Mr. Clarke refused to show his plans except as the architect of the church, and then Mr. Collier said Mr. Clarke was right; that they had treated him as the architect.

"*The attention of the Court was not again called to the question as to the admissions of what was said by Mr. Collier, by the counsel of the defendant; neither did the Court refer to the subject.* And for this reason the only effect of the admissions or declarations made by Mr. Collier on the occasions mentioned was to show that Mr. Clarke was the architect of the society. *The Court considered this fact was not proved by the plaintiffs; and the case was submitted to the jury on that hypothesis.*

"The real question on this part of the case was, whether, when the plaintiffs' plans were conditionally accepted and modified, alterations made at the suggestion of the committee, or otherwise, and finally rejected, they were to be paid anything for their services.

"The Court therefore regarded the admissions of Mr. Collier as not at all material, and supposed that the defendants' counsel so

considered them, or he would have afterwards called the attention of the Court to its ruling on these admissions.

"But, independent of this, while it is true that Mr. Collier originally had no authority to employ the plaintiffs as architects, there was evidence tending to show that he, as pastor of the church, acted and consulted with the committee with their consent. And it appeared that, at the instance of Mr. Collier, there was an alteration made as to the size of the church, and about which there was no controversy."

It is argued that the *jury might have understood* this state of facts differently, and that it does not appear that the objection taken at the trial "was afterwards waived, or that the error was substantially corrected in the charge of the Court."

Brief of plaintiff in error, p. 5.

To which it may be replied that, as nothing appears in the record to substantiate this position, it is equally proper to assume that the jury did not regard this testimony in coming to the conclusion expressed by their verdict.

The second assignment of error is as follows: —

Brief of plaintiff in error, p. 4.

"The Court erred in charging the jury in these words: 'Now, in connection with this part of the case, it is important to consider the subject of cost. What is a fair inference from the evidence which we have before us as to the cost? The cost of the church, when completed, should not exceed $58,000. There must be a reasonable construction given to this language. It is manifest, as I have already said, contracts might have been let to parties apparently responsible at the time for that price, and yet the actual cost might have turned out to be greater.

"It is manifest that there are certain elements always entering into matters of this kind, and that all reasonable men must construe this language with reference to these circumstances. It cannot, I think, fairly be supposed the meaning was that the church should not cost to a dollar beyond this amount; but here was a reasonable limit to

the cost; applying all those ordinary rules which men of sense would apply to such a transaction as this.

. . . . . .

"But I understand it to mean that it was a limit to the architects, and to the committee; not absolutely, but as nearly exact and absolute as the nature of the circumstances and of the case admitted."

Counsel for the plaintiff in error omits from the language of the learned judge, which he quotes as foundation of error, a paragraph which should be read in the same connection.

After the words, "Applying all those ordinary rules which men of sense would apply to such a transaction as this," Judge DRUMMOND continued: —

Record, p. 12.

"Now I can illustrate this by referring to what was said by Mr. Shorey to Mr. Clarke at the interview which took place between them after the meeting of the society. He undertook to construe the resolution — he had given a very liberal construction to the original instructions from the society, much more so than he was willing to give to instructions in this instance to the building committee. He told Mr. Clarke that he meant that it should not cost $5.00 more than $58,000."

And after he had said this, His Honor continued: —

Record, p. 12.

"But I understand it to mean that it was a limit to the architects, and to the committee; not absolutely, but as nearly exact and absolute as the nature of the circumstances and of the case admitted."

And after having said this, His Honor continued: —

Record, p. 12.

"*Now this is no further material than as it may bear on this general question, whether Mr. Clarke all this time was going on performing the services at his own expense upon the understanding that if his plans were ultimately rejected by the society he was to have no compensation.*" It scarcely could be contended by Mr. Shorey, or by any member of the committee, that if the plans were accepted, and the

contracts let at the price named, and Mr. Clarke had gone on and performed the service, and it had turned out that they would have to expend more than $48,000 to complete the church, that therefore Mr. Clarke was to have nothing for his services. Suppose the contractors all failed — became bankrupt; was Mr. Clarke to have nothing for what he had done, although the church did in consequence cost more than $58,000?"

The actual issues involved in this cause are thus stated by the learned judge in a paragraph of the record, to which no exception has been taken.

Record, p. 19 (37).

"And the Court instructed the jury that if what Mr. Clarke did, after the qualified acceptance of his plans, was upon the same condition in which the various competing plans were originally put in, *then the plaintiffs could not recover*, and they could only recover upon the hypothesis *that it was understood between the parties that in case the plans of the plaintiffs were ultimately rejected, as in fact they were, they were to have a reasonable compensation for services performed.* The Court also instructed the jury that the defendants were only liable for the acts of its agents duly authorized or ratified by the society. And the Court also instructed the jury what was the rule of damages if they should find for the plaintiffs."

The issues then, in this cause, were,

I. Was there authority for the employment of the plaintiffs below.

II. Was it understood between the parties that plaintiffs were to receive payment for actual services rendered, whether as architects in charge of the building, or otherwise?

III. As to the value, if any, of such services.

The jury answered the questions involved in the first and second issues in the affirmative. They answered the third query that the services were worth $3,862.50. No objection was made to the statement of these questions as such, to the jury for their finding, and after verdict the plaintiff, at the suggestion of the judge, reduced his judgment to $2,900.

Now the defendants came into the Appellate Court and ask that a verdict of a jury be set aside, and that the action of the judge who refused a new trial be reversed, on the ground that the Court erred in instructing the jury as to a point which is not alleged to be material.

No citation of authorities is necessary to support the position that, where the issues submitted to the jury are within the province of the jury to determine there is no error. And it is respectfully submitted that the issues in this case, as stated in the bill of exceptions, to which statement no objection is made, were such as were properly passed upon by the jury.

The argument of counsel for the plaintiff in error is based on a state of facts not shown by the record to exist. As he has not suggested a diminution of record, his case must stand or fall on this record as it now is.

There is no foundation in the record for the assumption *that defendants in error ever knew* that their plans were accepted on the understanding that the church was to cost only $58,000. There is no showing that all the details of the vote of the society to that effect were ever communicated to them. On the contrary, the record says, after reciting the vote,

Record, p. 10.

"*And there was evidence tending to show that plaintiffs* DID NOT HAVE NOTICE *of all the conditions and provisions annexed to this vote.*"

Thus it appears that the minds of the parties did not meet on this point, and that it was not properly an issue in the case, and that for this reason the case of *Methodist Church vs. Garnsey*, 64 Ill., is not in point.

It is believed that the bill of exceptions sets out the case fairly, and that, *taken as a whole*, it shows no reason why the judgment should be reversed.

MOTION.

The defendants in error respectfully submit in conclusion that this is a case for the enforcement of that rule of the Supreme Court

which allows damages for delay when writs of error are prosecuted having no solid foundation in law, and they respectfully apply for the benefits of the enforcement of that rule in this cause.

R. M. CORWINE,
QUINTON CORWINE,
J. A. L. WHITTIER,
Counsel for Defendants in error.

No. 7 - Original

1-4 1/2 3

No. Justice Swayne

U. S. SUPREME COURT.

FRENCH

VS.

EDWARDS ET AL.

Motion for Mandamus or Order Directing Circuit Court to Enter Judgment.

S. O. HOUGHTON,
JOHN REYNOLDS,
For Plaintiff.

JOHN J. CONMY, STEAM PRINTER, FIRST STREET, SAN JOSE.
1875.

IN THE SUPREME COURT

OF THE

UNITED STATES.

IRA G. FRENCH

vs.

THOMAS EDWARDS ET AL.

To the Hon. The Supreme Court of the United States.

The petition of the plaintiff, Ira G. French, respectfully shows unto this Court: That at the October Term of this Court for the year A. D. 1874, the judgment of the Circuit Court for the District of California was reversed, and this cause remanded, with directions to said Circuit Court to take further proceedings therein, in conformity to the opinion of this Court. That thereafter the Mandate of this Court was filed in the said Circuit Court; and thereafter that Court, upon due notice to the defendants' counsel, was moved on the 9th day of September, 1875, to proceed to determine the law upon the facts found, and to pronounce

judgment thereon, in accordance with said opinion of this Court. The defendants, by their counsel, appeared and opposed said motion of the plaintiff's counsel, and insisted that the defendants were entitled to have a new trial of this action, notwithstanding the opinion and directions of this Court. Whereupon the said Circuit Court ordered that said cause be placed upon the calendar of that Court for a new trial, and that all proceedings therein be stayed to allow the plaintiff to apply to this Court for a mandamus directing said Circuit Court to proceed to enter judgment upon the special findings of fact found in the case.

The plaintiff produced in support of his said motion the record upon which this case was heard in this Court, to which the plaintiff hereby refers; the Mandate of this Court to the said Circuit Court, which reads as follows:

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Honorable the Judges of the Circuit Court of the United States for the District of California, Greeting:

Whereas, lately, in the Circuit Court of the United States for the District of California, before you, or some of you, in a cause between Ira G. French, plaintiff, and Thomas Edwards, W. T. Carothers, Samuel Oneste, Antonio de Silva, David

Morel, Samuel O. Ness, Leonard Hough, Jefferson Lake, W. W. Crouse, L. W. Lincoln, Andrew Carothers, and R. Sherburn, defendants, wherein the judgment of said Circuit Court entered in said cause on the 30th day of October, A. D. 1872, is in the following words, viz:

"It is considered by the Court that the plaintiff take nothing by this action, that the defendants go hereof without day, and that the defendants do have and recover of and from Ira G. French, plaintiff, their costs in this behalf expended, taxed at three hundred and ninety-five 35-100 dollars."

As by the inspection of the transcript of the record of the said Circuit Court, which was brought on to the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress, in said case made and provided, fully and at large, appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and seventy-four, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby reversed with costs, and that the said plaintiff, Ira G. French, recover against the said defendants, one hundred and twenty-five dol-

lars and seventy-five cents, for his costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court, for further proceedings to be had therein in conformity with the opinion of this Court.

11th January, 1875.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the sixteenth day of July, in the year of our Lord one thousand eight hundred and seventy-five.

Costs of plaintiff:

Clerk,	$105.75.
Attorney,	20.00.
	$155.75.

Taxed by

D. W. MIDDLETON,
Clerk of the Supreme Court
of the United States.

Endorsed:

"234

No. 107, October Term, 1874.

Mandate.

Supreme Court United States.

French vs. Edwards et al.

Filed 6 September, 1875.

L. S. B. SAWYER, Clerk:"

and the opinion of this Court, as found in volume 21 of Wallace's Reports, on pages 149, 150 and 151.

The order made by the Circuit Court reads as follows:

"At a Stated Term of the Circuit Court of the United States for the Ninth Judicial Circuit, within and for the District of California, held at the City and County of San Francisco on Thursday, the ninth day of September, A. D. 1875,

Present: Hon. STEPHEN J. FIELD, Associate Justice of the Supreme Court, and Hon. LORENZO SAWYER, Circuit Judge.

IRA G. FRENCH

vs.

THOMAS EDWARDS ET AL.

This cause came on to be heard this day, upon a motion for judgment herein, John Reynolds, Esquire, appearing on behalf of plaintiff, and Delos Lake, Esquire, for defendants, and was argued and submitted to the Court for consideration and decision.

It is ordered that this cause stand on the calendar of this present term for a new trial, and that proceedings be stayed herein in order that plaintiff may apply to the United States Supreme Court for

a writ of mandamus to compel entry of judgment herein."

Wherefore your petitioner prays that a writ of mandamus may issue from this Court to said Circuit Court for the District of California, ordering and directing said Circuit Court to proceed and enter a judgment in favor of the plaintiff for the recovery the lands demanded in his complaint; or that this Court otherwise order the Circuit Court to proceed to correct its error and enter judgment upon the facts found.

S. O. HOUGHTON and
JOHN REYNOLDS,
Attorneys for Plaintiff.

STATE OF CALIFORNIA, ss.

John Reynolds being duly sworn, says that he is an attorney of the Supreme Court of the United States, and attorney for the plaintiff in the above entitled action. That he has read the foregoing petition and knows the contents thereof, and the same is true.

JOHN REYNOLDS.

Subscribed and sworn to before me this 23d day of September, A. D. 1875.

L. S. B. SAWYER, Clerk.

In the Supreme Court of the United States.

IRA G. FRENCH

vs.

THOMAS EDWARDS ET AL.

To DELOS LAKE, Esq., Attorney for Deft's.

Sir: Please take notice that upon the petition, a copy of which is herewith served upon you, and the record of this case in said Supreme Court, we shall move the Supreme Court of the United States, at the opening of said Court on the second Monday in October next, or as soon thereafter as counsel can be heard, to grant the prayer of said petition and issue a mandamus to, or otherwise order the Circuit Court to proceed to enter judgment in favor of the plaintiff upon the facts found.

Dated September 23d, 1875.

Yours, &c.,

HOUGHTON & REYNOLDS,

Att'ys for Deft's.

Service accepted by copy, this ..... *day*

of *187*

.....

Attorney for Defendants.

No.

U. S. SUPREME COURT.

FRENCH

VS.

EDWARDS.

BRIEF ON MOTION FOR MANDAMUS.

S. O. HOUGHTON,
JOHN REYNOLDS,
For Plaintiff.

JOHN J. CONMY, STEAM PRINTER, FIRST STREET, SAN JOSE.
1875.

Service

of

U. S. SUPREME COURT.

FRENCH
vs.
EDWARDS.

Brief on Motion for Mandamus.

I.

The law provided that when the Court tried a case without a jury, the findings might be general or special, and should have the same effect as a verdict of a jury.

U. S. Rev. Stat. § 469.

The findings in this case were special, and had therefore the effect of a special verdict.

And the office of a special verdict is to find the facts, leaving nothing for the Court but to apply the law to the facts and pronounce the proper judgment.

And that, we understand, to be substantially the direction of this Court to the Circuit Court in this case. To take further proceedings *upon the special verdict.*

II.

Section 914 U. S. Rev. Stat. adopts the State practice in common law cases. And § 701, so far as it affects this question, is substantially the same as the Statutes of California, under which it has been the settled practice in the Supreme Court of California since Holland vs. San Francisco, decided in 1857, to direct final judgment on the reversal of a judgment, when the case was decided in the Supreme Court upon special findings of fact.

Stats. of Cal. 1853, *p.* 289, § 8.
Stats. of 1863, *p.* 334, § 7.
Code C. P. § 45.
McMillan vs. Richards, 9 *Cal. page* 421.
Wallace vs. Moody, 26 *ib.* 387.
Page vs. Rogers, 31 *ib.* 293.
McMillan vs. Vischer, 14 *ib.* 242.

All the facts are found necessary to a final determination of the case.

(*a*) The distinguished counsel for the defendants can not have been surprised at the direction of this Court to the Circuit Court to proceed upon this special finding without a new trial, for they had been familiar with such practice for fifteen years.

III.

The opinion and directions of this Court are conclusive, and there was no discretion left to be exer-

cised by the Circuit Court. And we respectfully submit that nothing remains but for this Court to direct the Circuit Court to proceed to correct its erroneous conclusions upon the special verdict.

IV.

It may be claimed by the defendants' counsel that they could have proven other facts in their defense. This case has already been twice to this Court, and if the defendants are permitted to withhold portions of their defense, and send the case here upon special verdicts to determine one question at a time, there would be no end to the litigation.

(*a*) The Act of Congress provides that the Court may render a general or special finding. And when the finding is special it is presumed that the Circuit Court was fully advised that the whole defense was in, and that the special finding was to take the opinion of this Court upon the facts, and save another trial.

(*b*) The defendants' counsel knew that the finding was special, and if they had other defenses which the ruling of the Court upon this trust deed rendered it, in their judgment, unnecessary to present, or which they desired to keep back for another trial, it was a matter to submit to the Circuit Court, to induce that Court to make a general finding. If that was done, and the Circuit Court refused it, it must be presumed to have been

refused for a good reason; or if that Court was not asked to make a general finding or find other facts, this Court will presume that nothing more remained for the defendants but further delay.

Respectfully submitted.

HOUGHTON & REYNOLDS,
For Plaintiff.

V.

Although a bill of exceptions was sent up to this Court in the record, the case was not heard upon it. The only exception in the bill was that the Circuit Court erred in admitting the trust deed in evidence. This exception was not considered in this Court, it being held that the deed was properly admitted, but when admitted, it did not warrant the conclusion of law of the Circuit Court.

The case is therefore fully within the case of *Jennison vs. Leonard*, 21 *Wallace*, 307, in which the Court says: "There are no exceptions to the rulings of the Court in the progress of the trial, and no objection of that character can now be heard. We are authorized by the statute of March 3d, 1865, when the finding of fact is special, to review 'the determination of the sufficiency of the facts found to support the judgment,' *and we are authorized to examine no other question*. In an ordinary judgment for the plaintiff, certain propositions of law are announced by the judge as having been held by him. These are important only as they necessarily and of themselves affect the question, whether the facts found are sufficient to support the judgment."

ervice accepted by copy, this ..... day

..... 187

Attorney for Defendants.

In the Supreme Court of the United States.

IRA G. FRENCH, PLAINTIFF IN ERROR,

vs.

THOMAS EDWARDS ET AL., DEFENDANTS IN ERROR.

The defendants, Thomas Edwards, W. T. Carothers, J. T. Carothers, Leonard Hoyt, Jefferson Lake, W. W. Crouse, L. M. Lincoln, A. Carothers and R. Sheehan, answer the petition of plaintiff for a writ of mandate, and allege :

I.

That on said 9th day of September, 1875, the said case came on to be heard upon the motion mentioned in the said petition, notice for which motion was in the following words :

"*To* DELOS LAKE *and* J. H. MCKUNE, *Defendants' Attorneys—*

Gentlemen :

Please take notice that I shall move this Court on Monday, the 9th day of August, 1875, at the opening of that Court, in the City of San Francisco, on that day, or as soon thereafter as counsel can be heard, to change the conclusion of law, and to enter a judgment in favor of plaintiff upon the facts found in this case, in accordance with the mandate of the Supreme Court of the United States.

Yours, etc.,

JOHN REYNOLDS,

Plaintiff's Attorney.

II.

That on the hearing of said motion, the said Circuit Court did take such further proceedings in said case as were in conformity with the opinion and judgment of said Supreme Court, and as to right and justice, and the laws of the United States did appertain, and such as ought to be had in the premises, and made and entered in said case an order, of which the following is a copy:

"This cause came on to be heard this day, upon motion for judgment herein, John Reynolds, Esq., appearing on behalf of plaintiff, and Delos Lake, Esq., for defendants, and was argued by counsel, and submitted to the Court for consideration and decision. It is ordered that this cause stand on the calender of this present term for a new trial, and that proceedings be stayed herein in order that plaintiff may apply to the United States Supreme Court for a writ of mandamus to compel entry of judgment herein."

III.

That the finding of facts relied on by plaintiff are incomplete and inaccurate, and were drawn and intended mainly to exhibit a single point of error arising out of the construction of the deed of trust therein set out. That attorney for defendants consented to allow certain matter proven and appearing at the trial of said case, not to appear in the findings on the theory and belief, that if the judgment should be reversed on error, a new trial must necessarily be had, and certain matters were therein inserted directly contrary to all the proofs in said case, and these defendants show to the Court, the following particulars:

(*a*) The finding was that the defendants, who here appeared and answered in this action, were in the exclusive adverse possession of the premises described in the complaint, whereas each was in possession only of a part thereof, holding in severalty, and together they held much less than the whole tract.

(*b*) The finding was that R. H. Vance was on the 1st day of March, 1862, owner in fee of the premises in dispute, whereas about forty acres thereof was entirely outside of the grant under which he claimed and at the trial plaintiff abandoned his claim to so much thereof.

(c) It appeared at the trial of said case that defendant Edwards never had possession of more than a single lot of less that two acres of said land, and to that part he so held in possession, he had a perfect title.

The foregoing matters appeared at the said trial uncontradicted.

IV.

The defendants also, at said trial, introduced in evidence certain matters tending to show outstanding titles to a large part of said land in others, and to the whole of it, in defendant Lincoln; and defendants claimed and claim a right to have the question raised upon those matters decided by the Circuit Court; and if decided adversely to them, to have any error which may or might intervene corrected.

V.

That at the time said motion was heard in the Circuit Court, September 9th, 1875, the foregoing matters all appeared in the minutes of the Judge taken at the last trial of said case; and in full view of such and other facts, the said Circuit Court decided to put the case on the calender for a new trial.

J. H. McKUNE,
For said Defendants.

STATE OF CALIFORNIA.—ss.

L. M. Lincoln, one of the defendants in said case, being duly sworn, deposes and says he has read the foregoing answer, and knows the contents thereof, and the same is true.

L. M. LINCOLN.

SEAL.

Subscribed and sworn to before me this 13th day of October, 1875.

EDW. CADWALADER, U. S. Commissioner.

In the Supreme Court of the United States.

IRA G. FRENCH, PLAINTIFF IN ERROR,

vs.

THOMAS EDWARDS ET AL., DEFENDANTS IN ERROR.

The defendants, Thomas Edwards, W. T. Carothers, J. T. Carothers, Leonard Hoyt, Jefferson Lake, W. W. Crouse, L. M. Lincoln, A. Carothers and R. Sheehan, answer the petition of plaintiff for a writ of mandate, and allege :

I.

That on said 9th day of September, 1875, the said case came on to be heard upon the motion mentioned in the said petition, notice for which motion was in the following words :

"*To* DELOS LAKE *and* J. H. MCKUNE, *Defendants' Attorneys—*

Gentlemen :

Please take notice that I shall move this Court on Monday, the 9th day of August, 1875, at the opening of that Court, in the City of San Francisco, on that day, or as soon thereafter as counsel can be heard, to change the conclusion of law, and to enter a judgment in favor of plaintiff upon the facts found in this case, in accordance with the mandate of the Supreme Court of the United States.

Yours, etc.,

JOHN REYNOLDS,

Plaintiff's Attorney.

II.

That on the hearing of said motion, the said Circuit Court did take such further proceedings in said case as were in conformity with the opinion and judgment of said Supreme Court, and as to right and justice, and the laws of the United States did appertain, and such as ought to be had in the premises, and made and entered in said case an order, of which the following is a copy:

"This cause came on to be heard this day, upon motion for judgment herein, John Reynolds, Esq., appearing on behalf of plaintiff, and Delos Lake, Esq., for defendants, and was argued by counsel, and submitted to the Court for consideration and decision. It is ordered that this cause stand on the calender of this present term for a new trial, and that proceedings be stayed herein in order that plaintiff may apply to the United States Supreme Court for a writ of mandamus to compel entry of judgment herein."

III.

That the finding of facts relied on by plaintiff are incomplete and inaccurate, and were drawn and intended mainly to exhibit a single point of error arising out of the construction of the deed of trust therein set out. That attorney for defendants consented to allow certain matter proven and appearing at the trial of said case, not to appear in the findings on the theory and belief, that if the judgment should be reversed on error, a new trial must necessarily be had, and certain matters were therein inserted directly contrary to all the proofs in said case, and these defendants show to the Court, the following particulars:

(*a*) The finding was that the defendants, who here appeared and answered in this action, were in the exclusive adverse possession of the premises described in the complaint, whereas each was in possession only of a part thereof, holding in severalty, and together they held much less than the whole tract.

(*b*) The finding was that R. H. Vance was on the 1st day of March, 1862, owner in fee of the premises in dispute, whereas about forty acres thereof was entirely outside of the grant under which he claimed and at the trial plaintiff abandoned his claim to so much thereof.

(c) It appeared at the trial of said case that defendant Edwards never had possession of more than a single lot of less that two acres of said land, and to that part he so held in possession, he had a perfect title.

The foregoing matters appeared at the said trial uncontradicted.

IV.

The defendants also, at said trial, introduced in evidence certain matters tending to show outstanding titles to a large part of said land in others, and to the whole of it, in defendant Lincoln; and defendants claimed and claim a right to have the question raised upon those matters decided by the Circuit Court; and if decided adversely to them, to have any error which may or might intervene corrected.

V.

That at the time said motion was heard in the Circuit Court, September 9th, 1875, the foregoing matters all appeared in the minutes of the Judge taken at the last trial of said case; and in full view of such and other facts, the said Circuit Court decided to put the case on the calender for a new trial.

J. H. McKUNE,
For said Defendants.

STATE OF CALIFORNIA.—ss.

L. M. Lincoln, one of the defendants in said case, being duly sworn, deposes and says he has read the foregoing answer, and knows the contents thereof, and the same is true.

L. M. LINCOLN.

SEAL.

Subscribed and sworn to before me this 13th day of October, 1875.

EDW. CADWALADER, U. S. Commissioner.

In the Supreme Court of the United States.

IRA G. FRENCH, PLAINTIFF IN ERROR,

vs.

THOMAS EDWARDS ET AL., DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS.

This Court, on appeal or writ of error, may affirm, modify, or reverse a judgment of a Circuit Court, and it may direct a particular judgment to be rendered, or such further proceedings to be had as the justice of the case may require. (*Revised Statutes, p.* 131, *Sec.* 701.)

The mandate of this Court was that further proceedings be had in conformity with the opinion and judgment of this Court rendered in said case, and such as, according to justice and right, should be had.

The facts known to the Circuit Judge who tried the case, were such that to grant the plaintiff's motion, would give the plaintiff land he did not own, and to burden defendants unjustly; and the Circuit Court properly took the motion for judgment under advisement, and set the case on the calendar for hearing.

At such hearing, the Circuit Court will conform to the opinion and judgment of this Court, which was all required of it in the mandate.

II.

But the findings relied on do not authorize or warrant the entry of a judgment. The summons was issued November 8th,

1866. (Folio 5 of Transcript.) One R. H. Vance, being the owner of the *locus in quo* March 1st, 1862, conveyed it to plaintiff, who remained the owner to the 9th day of January, 1863. (Folios 45 and 46 of Transcript.) There is no finding that at the date of the commencement of this action, the plaintiff was the owner of the land. The fact of his ownership January 9th, 1863, is no proof, or at least no finding, of ownership November 8th, 1866, nearly four years latter; and on the findings, judgment should be entered for the defendants.

III.

But if this Court had, by its mandate, directed a specific judgment to be entered, still should it appear that justice and right required that a new trial be had it would be granted. (*Milwaukie & C. R. R. Co.* v. *Soutter*, 2 *Wall*, 510)

The motion for mandate or further order should be denied.

J. H. McKUNE,
For Defendants.

H. A. WEAVER, PRINTER.